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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

GREGORY FOSTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

A. Should the trial court have granted a mistrial rather than ordering the seating of an alternate juror during the sixth day of deliberations?

B. Did the change of circumstances permit petitioner to withdraw from the Stipulation which waived the manditory requirements of Rule 24(c), Federal Rules of Criminal Procedure?

C. Was it proper for the trial court to give a modified **Allen** instruction?

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This is a petition for GREGORY FOSTER for a Writ of Certiorari to review the Opinion filed by the United States Court of Appeals for the Ninth Circuit on July 26, 1983, affirming petitioner's conviction for conspiracy to possess heroin with intent to distribute in violation

of 21 U.S.C. §§ 841(a)(1) and 846, and numerous substantive counts of possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The United States Court of Appeals for the Ninth Circuit, among its various rulings, held that the petitioner and his counsel voluntarily chose to waive the mandatory language of Rule 24(c), Federal Rules of Criminal Procedure, in agreeing to proceed with an 11-person jury. Specifically, the Court concluded that neither the petitioner nor his counsel were initially coerced into stipulating to the substitution of an alternate juror after deliberations had begun, and that the subsequent change in circumstances did not require the trial court to relieve them from the stipulation. In addition, the Court of Appeals

also held that the trial court did not abuse its discretion by the giving of an **Allen** charge on the fifth day of deliberations.

OPINIONS BELOW

To the petitioner's knowledge, the Opinion in the United States Court of Appeals for the Ninth Circuit, affirming petitioner's conviction, has been officially reported at 711 F.2d 871 (1983). (A copy of the Opinion is attached to the Appendix hereto.)

JURISDICTION

1. On April 30, 1981, the Federal Grand Jury for the Southern District of California returned a 27 count Indictment against petitioner and 30 other

persons. Count One charged all of the defendants in a conspiracy under Title 21, United States Code Sections 841(a)(1) and 846, to possess with intent to distribute heroin. The remaining counts charged petitioner individually and certain defendants on specific dates with the substantive act of possession of heroin with intent to distribute in violation of Title 21, United States Code Section 841(a)(1).

2. On October 23, 1981, at the suggestion of the trial court, a written Stipulation was entered into whereby all parties agreed to waive the requirement of Rule 24(c), Federal Rules of Criminal Procedure, and to the retention of the first two alternate jurors. During the sixth day of deliberations, after a partial verdict had been returned

acquitting one of the defendants and the trial court had given a modified **Allen** charge, the court received a note from the jury concerning the difficulties one juror was experiencing and his wish to be relieved. After meeting with this juror in chambers in the presence of all counsel, the court indicated its intention to release this juror. Counsel objected to the juror being excused and renewed their motion for a mistrial. The court again denied the motion for a mistrial and again stated that it was prepared to substitute an alternate for this juror pursuant to the Stipulation. Thereafter, six of the seven defendants on trial indicated that they were willing to go with the 11 remaining jurors rather than with the seating of the alternate juror. The court agreed to

follow this procedure and instructed the 11 jurors to resume their deliberations as to all of the defendants except the one defendant who wanted the alternate seated. In the afternoon of the following day, the jury returned a verdict of guilty against petitioner on Counts One-Seven, Nine-Twenty and Twenty-Three.

3. On December 7, 1981, petitioner was sentenced to the custody of the Attorney General for a period of fifteen (15) years and fined the amount of $25,000 on Count One; a period of three (3) years in custody and a fine of $25,000 on Counts Two-Seven, to run consecutive to the sentence imposed on Count One; a period of fifteen (15) years and a $25,000 fine on Counts Nine-Twenty, to run concurrent with the sentences on Count One and Counts Two-

Seven. In addition, a Special Parole Term of Twenty (20) years was imposed on Counts Two-Seven and Nine-Twenty, to run concurrently. On Count Twenty-Three, petitioner was placed on probation for a period of five (5) years to run consecutive to the sentences imposed on the other counts. Petitioner thereafter filed a timely Notice of Appeal.

4. On July 26, 1983, the United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction. Petitioner sought further review of the Panel's Opinion from the entire Court by filing a Petition for Rehearing and Suggestion for Rehearing En Banc, but the suggestion for an en banc rehearing was rejected on December 13, 1983.

5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Rule 24(c), Federal Rules of Criminal Procedure.

"Rule 24. Trial Jurors

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does

not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror."

2. Title 21, United States Code Section 841(a)(1).

"841 Prohibited Acts. A-Unlawful Acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute,

or dispense, a controlled substance."

3. Title 21, United States Code Section 846.

"846 Attempt and conspiracy.

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE FACTS

At the suggestion of the trial court,[1/] a written Stipulation was entered into and filed October 23, 1981,

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1/ The court specifically stated that if a problem arose with one of the jurors forcing a mistrial, counsel would be required to retry the matter the next week when the remaining defendants, who had previously been severed, were scheduled for trial.

whereby all parties agreed to waive the requirement of Rule 24(c), Federal Rules of Criminal Procedure, and to the retention of the first two alternate jurors. After returning a partial verdict on the fourth day of deliberations acquitting one of the defendants, the court received a note the following day which stated that one of the jurors was requesting to be released as the length of the proceeding was causing a strain on his family and job situation. After discussion with counsel, the court responded by asking the jury to continue its deliberations.

Later that same day, the court received another note stating that a second juror wanted to be released as the jury "seem[ed] to be at a stand off" and "there is no clear end in sight".

When the court indicated that it was at this point planning to give a modified **Allen** charge, all counsel objected and moved for a mistrial. The court denied the motion, and again expressed its intention that if the jury indicated it was deadlocked, the court would give the modified **Allen** instruction. When the jury foreman indicated that a few of the jurors believed they were "hopelessly deadlocked", the court read this instruction.

The following day, being the sixth day of deliberations, the court again received a note from the jury concerning the difficulties the one juror was experiencing and his wish to be released. After meeting with this juror in chambers in the presence of all counsel, the court indicated its intention to

release this juror. Counsel objected to the juror being excused and again renewed their motion for a mistrial. The court again denied the motion for a mistrial and again stated that it was prepared to substitute an alternate for this juror pursuant to the Stipulation.

Counsel thereafter met with their clients to discuss the possibility of going with an 11-person jury, rather than seating the alternate. At this point, one of co-counsel stated that upon a re-reading of Rule 24(c), it was apparent that the seating of an alternate juror was not permissible under any circumstances at this stage of the proceedings, and that counsel were requesting to withdraw from the stipulated agreement. Counsel for petitioner concurred on the grounds that at the time

the Stipulation was entered into, the pending situation was never envisioned, and that due to one of the defendants already having been acquitted, it was not appropriate to seat another juror after six days of deliberations. The court responded to these comments by stating that unless there was unanimity among all of the defendants to go forward with 11 jurors rather than inserting the alternate, the court would proceed pursuant to the Stipulation and seat the alternate. When one of the defendants stated that he preferred the alternate, the trial court excused the juror, and indicated that an alternate juror would be substituted on his behalf.

On the following Monday, November 2, 1981, the six defendants who indicated

that they would be willing to go with the 11 remaining jurors rather than with the alternate requested the court to instruct those 11 to withdraw the one defendant's case from their considerations and to proceed with their deliberations as to the other defendants. After inquiring of the defendant and counsel that this was their desire, the court agreed to follow this procedure and instructed the 11 jurors to resume their deliberations as to all of the defendants except the one defendant.

In the afternoon of the following day, November 3, 1981, the jury returned a verdict of guilty against petitioner on Counts One-Seven, Nine-Twenty and Twenty-Three.

REASONS WHY THE WRIT SHOULD BE GRANTED

Most commentators and courts have continually doubted the desirability and constitutionality of permitting an alternate juror to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. There appears to be universal agreement that the danger of prejudice to the defendant is too great to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion. This is so because the inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a premature

guilty verdict. Conversely, a lone juror holding out for acquittal may find himself pressured to feign illness or incapacity to place the burden of decision on a waiting alternate, thus, significantly limiting the accused's right to a mistrial.

Recognizing the inherent problems of such a procedure, the Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 338 (1981), chose to recommend to amend Rule 23(b) by permitting deliberations to continue with 11 jurors rather than amending Rule 24(o) and allowing the substitution of an alternate once deliberations had begun. The Advisory Committee similarly commented on the constitutional difficulties involved in the substitution plan due to the inability

of a court to counter the influence and intimidation the new juror would undoubtedly be subject to by virtue of being a newcomer to the deliberations.

It was precisely for these very reasons that petitioner and his counsel decided to proceed with an 11-person jury rather than agreeing to the seating of the alternate. But, because of the circumstances which had occurred during the six days of deliberations, petitioner and counsel were forced to agree to this procedure as the "lesser of two evils." Once the jury had reached a partial verdict and then indicated it was "hopelessly deadlocked" on two occasions, the only proper action that should have been taken was the granting of a mistrial. Instead, the trial court gave a modified **Allen** instruction and

then released the one juror setting up the "dammed if I do, dammed if I don't" decision. Considering the Fifth Amendment due process and Sixth Amendment ramifications of this situation, certiorari must be granted to remedy the injustice done in this case.

ARGUMENT

THE CIRCUMSTANCES SURROUNDING THE JURY'S DELIBERATIONS NECESSITATED THE GRANTING OF A MISTRIAL.

In order to properly evaluate the issues involved in this argument, it is first necessary to again review the sequence of events which eventually led to the jury's finding of guilty:

1. Toward the latter part of the trial, the court first suggested the possibility of stipulating to the retention of the alternate jurors, indicating

that if a mistrial had to be declared because of a problem with one of the jurors, counsel would be required to go to trial the following week with the remaining severed defendants.

2. Just prior to the end of the trial, the court again brought up the idea of retaining the alternate jurors. In fact, the court prepared the written Stipulation wherein all parties agreed to waive the requirements of Rule 24(c), Federal Rules of Criminal Procedure, and to the retention of the first two alternate jurors.

3. After a partial verdict had been returned on the fourth day of deliberations acquitting one of the defendants, the court received a note the following day which stated that one of the jurors was requesting to be released as the

length of the proceedings was causing a strain on his family and job situation. After discussion with counsel, the court responded by asking the jury to continue its deliberations.

4. Later that same day, the court received another note stating that a second juror wanted to be released as the jury "seem[ed] to be at a standoff" and "there is no clear end in sight." When the court indicated that it was at this point planning to give a modified **Allen** charge, all counsel objected and moved for a mistrial. The court denied the motion and again expressed its intention that if the jury indicated it was deadlocked, the court would give the modified **Allen** instruction. When the jury foreman indicated that a few of the jurors believed they were "hopelessly

deadlocked" the court read this instruction.

5. During the sixth day of deliberations, the court again received a note from the jury concerning the difficulty the one juror was experiencing and his wish to be released. After meeting with this juror in chambers in the presence of all counsel, the court indicated its intention to release this juror. Counsel objected to the juror being excused and again renewed their motion for a mistrial. The court again denied the motion for a mistrial and again stated that it was prepared to substitute an alternate for this juror pursuant to the Stipulation.

6. Counsel thereafter met with their clients to discuss the possibility of going with an 11-person jury, rather

than seating the alternate. At this point, one of co-counsel stated that upon a re-reading of Rule 24(c), it was apparent that the seating of an alternate juror was not permissible under any circumstances at this stage of the proceedings, and that counsel were requesting to withdraw from the stipulated agreement. Counsel for petitioner concurred on the grounds that at the time the Stipulation was entered into, the pending situation was never envisioned, and that due to one of the defendants already having been acquitted, it was not appropriate to seat another juror after six days of deliberations. The court responded to these comments by stating that unless there was unanimity among all of the defendants to go forward with 11 jurors rather than

inserting the alternate, the court would proceed pursuant to the Stipulation and seat the alternate. When one of the defendants stated that he preferred the alternate, the trial court excused the juror, and indicated that an alternate juror would be substituted on his behalf.

7. Prior to the alternate being seated, the six defendants who indicated that they would be willing to go with the 11 remaining jurors rather than with the alternate requested the court to instruct those 11 to withdraw the one defendant's case from their consideration and to proceed with their deliberations as to the other defendants. After inquiring of the defendants and counsel that this was their desire, the court agreed to follow this procedure and

instructed the 11 jurors to resume their deliberations as to all of the defendants except the one defendant.

8. In the afternoon of the following day, the jury returned its verdict.

It is submitted that based upon these events, the trial court should have granted a mistrial when requested on numerous occasions, and that its failure to do so constituted an abuse of discretion of such magnitude as to justify the granting of certiorari to review the injustice perpetrated by the jury's verdict.

(1) Rule 24(c) Waiver

Rule 24(c) of the Federal Rules of Criminal Procedure states in pertinent part:

"Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. . . ." (Emphasis added.)

The present language of Rule 24(c) is little changed from a preliminary draft prepared in February, 1944. 3 L. Orfield, Criminal Procedure Under the Federal Rules 94 (1966). The draftsmen had previously considered and discussed the restriction against substituting an alternate once deliberations have begun. Id. at 94, 98; Orfield, Trial Jurors in

Federal Criminal Cases, 29 F.R.D. 43, 46, 53 (1961). A preliminary draft dated May, 1942, which contained a proposed rule that would have allowed substitution of an alternate juror after the jury retired for deliberations, was submitted to the Supreme Court for comment. The court queried the rules committee whether the committee had satisfied itself that such a procedure would be desirable or constitutional. Orfield, Trial Jurors in Federal Criminal Cases, **supra**, 29 F.R.D. at 46. The draftsmen of the rules committee did not adopt that proposed rule. It was feared that if such substitutions were permitted "[t]he members of the regular jury might bring such influence on a dissenter as to disable him and then require an alternate. The

alternate may have been exposed to improper influences before he takes part as he does not previously sit in the jury room." 3 Orfield, Criminal Procedure Under the Federal Rules **supra**, at 94.

While some states have adopted statutory criminal rules provisions allowing substitution of an alternate juror after deliberations have begun (e.g., Cal. Pen. Code §1089 (West); see Paisley, The Federal Rule on Alternate Jurors, 51 A.B.A.J. 1044, 1045 (1965)), the American Bar Association project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury §2.7 (approved Draft 1968), rejected such substitution provisions. The A.B.A. advisory committee on the criminal trial believed that it was undesirable to

substitute a juror who had not had the benefit of prior deliberations. Id. §2.7 at 83. (See also Report of the Jury Committee of the Judicial Conference of the United States (March 1973 at 7-8 (disapproving a proposed revision of Rule 24(c) that would retain jurors for possible substitution after deliberations had begun)).

Two Circuit Courts of Appeals that have considered the question have held that the requirement that the alternate "shall be discharged" after the jury retires is a mandatory requirement that "should be scrupulously followed." **United States v. Allison**, 481 F.2d 468, 472 (5th Cir. 1973), aff'd. after remand, 487 F.2d 339 (5th Cir. 1973), cert.den., 416 U.S. 982, 94 S.Ct. 2383 (1974): **United States v. Hayutin**, 398

F.2d 944, 2nd Cir., cert.den., 393 U.S. 961, 89 S.Ct. 400 (1968), subsequent appeal sub. nom., **United States v. Nash**, 414 F.2d 234 (2nd Cir.) cert.den., 396 U.S. 940, 90 S.Ct. 375 (1969). In **Leser v. United States**, 358 F.2d 313 (9th Cir.), petition for cert. dismissed, 385 U.S. 802, 87 S.Ct. 10 (1966), however, the Ninth Circuit held that an alternate juror could be substituted for a disabled juror, even after deliberations had begun, if the defendant had expressly stipulated to such substition. Id. at 317. While **Leser** has not been overruled per se, it is clear that a later Ninth Circuit decision, **United States v. Lamb**, 529 F.2d 1153 (9th Cir. 1975) (en

banc), has totally undermined that holding.[2/]

In **Lamb**, a case factually similar to the one at bar, the district court judge directed an alternate juror to "stand by" in case she was needed, but then discharged her when the jury returned a verdict of guilty after four hours of deliberations spread over two days. The court, however, refused the verdict because it was inconsistent with the instructions. When one of the original jurors requested to be excused due to a

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2/ One of the Nations most prestigious legal commentators, Professor Wright, in criticising the **Leser** decision, concluded that ". . . it is reversible error, even though defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate or to substitute an alternate after deliberations had begun." C. Wright, Fed. Practice & Procedure §388, Vol.2 at p. 52 (1969), quoted in **U.S. v. Lamb, supra**, at 1156.

personal problem, the court recalled the alternate and asked her to return to court. Over defense counsel's objection and motions re: mistrial, the court impaneled the alternate in the place of the other juror. The court then reinstructed the jury and told it to begin its deliberations anew. The newly constituted jury returned a guilty verdict after only 29 minutes of deliberations. After the final verdict was returned, the court sought and received assurances from the jury foreman and the alternate who had been substituted that the jury had begun deliberations anew and had discussed all the points of evidence.

In reversing the conviction, the Court, with only two dissenters, concluded that the brief amount of time in which the second verdict was reached

clearly demonstrated that the alternate had been impermissibly coerced and that the newly constituted jury did not give conscientious, careful consideration to the case despite the trial court's instruction that it begin anew. Id. at 1156. The Court did not base the reversal on the length of the deliberations, however, stating that this factor was "essentially irrelevant" (Id. at 1156, n. 7), but rather rested its decision on the mere fact that the mandatory provision of Rule 24(c) was violated. The Court noted some of the reasons underlying Rule 24(c), most significantly the "inherent coercive effect" upon an alternate juror who joins a jury after it has deliberated for some length of time and the possibility that a juror who disagreed with the other jurors

might be coerced into feigning incapacity to continue sitting on the jury. (Id. at 1156.)

Relying on the **Leser** decision, the Government attempted to argue that there had been a stipulation by counsel permitting seating of the alternate juror. The Court rejected this contention but, for the purposes of the instant case, stated that even if there had been such a stipulation before the jury retired, "we could not hold that such a stipulation would remain effective after dramatic changes of circumstances, including the original jury's arrival at a guilty verdict and the court's telephone call to the alternate j[illegible] to advise her that her services w[illegible] no longer be required because the original jury had reached a verdict." Id. at

1157.

Turning to the situation in the case at bar, there can be no doubt that the proposal to retain the alternate jurors originated with the trial court, was "strongly" urged by the trial court, and put in terms that if such a stipulation was not entered into, counsel and their clients would find themselves in trial again the following week in the event a mistrial was declared due to a problem with one of the jurors. This "set of facts" clearly distinguishes this case from **Leser**, where the district court judge did not urge the parties to enter into the stipulation and, indeed gave the parties every opportunity to refuse to do so. **Leser v. United States, supra**, 358 F.2d at 317. It is appellant's first contention, therefore, that the

apparent Rule 24(c) waiver approved in **Leser**, if still a viable precedent, cannot be applied to the instant case as the Stipulation was not entered into "freely and voluntarily," and without any coercion.

Beyond this question of the validity of the Stipulation, however, appellant additionally contends that he and his co-defendants had the absolute right to withdraw from the Stipulation due to the "dramatic changes of circumstances." As previously indicated, the jury had been deliberating for six days, had reached a partial verdict, had indicated they were "hopelessly deadlocked," received an **Allen** instruction, and, at least two of the jurors, had sent notes to the court stating that they wanted to be excused to go home. Under these circumstances,

which were totally unforeseen when the Stipulation was executed, counsel and their clients had every right to request to withdraw from the Stipulation, and to seek the declaration of a mistrial when the court indicated its intention to release the one juror. The failure of the court to permit withdrawal from the Stipulation and the intention to proceed under its terms to seat the alternate (which forced the decision to go with the 11 remaining jurors), constituted a clear abuse of discretion, and an even clearer violation of Rule 24(c).

Petitioner does recognize that in the recent decisions of **United States v. Phillips**, 664 F.2d 971 (5th Cir. 1981), cert.den., 102 S.Ct. 2965 (1982), and **United States v. Hillard**, 701 F.2d 1052 (2nd Cir.), cert.den., 103 S.Ct. 2431

(1983), both Circuit Courts of Appeals held that a violation of Rule 24(c) does not require a reversal per se, absent a showing of prejudice. The **Hillard** Court specifically distinguished the **Lamb** case on the basis that there was no suggestion of a coercive effect on the alternate juror, and that the district judge took sufficient precautions to ensure that they were not prejudiced. See, discussion, 701 F.2d at 1059-1061.

While the proposed changes to Rule 23(b) and 24(c) will undoubtedly eliminate the necessity of having to consider this issue again in the future, the fact remains that at the time the instant case was decided, **Lamb** was the prevailing law in the Ninth Circuit. Due to the split of the Circuits on this important issue, therefore, it is

respectfully submitted that the granting of certiorari is imperative in this case.

(2) Allen Instruction

Unlike the three Circuits which have disapproved the giving of the **Allen** charge,[3/] the Ninth Circuit has in "countless cases" approved an **Allen** charge. See **United States v. Beattie**, 613 F.2d 762-764 (9th Cir.), cert.den., 446 U.S. 892, 100 S.Ct. 2962 (1980), and cases cited therein. Even some of the Court's decisions, however, have expressed dissatisfaction with the giving of

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3/ See **U.S. v. Silvern**, 484 F.2d 879, 883 (7th Cir. 1973) (en banc); **U.S. v. Thomas**, 449 F.2d 1177, 1187 (D.C. Cir. 1971); **U.S. v. Fioravanti**, 412 F.2d 407, 420 (3rd Cir.), cert.den., 396 U.S. 837, 90 S.Ct. 97 (1969).

the **Allen** charge. As recently stated by Judge Kennedy in **United States v. Mason**, 658 F.2d 1263, 1266 (9th Cir. 1981):

> "We have noted . . . that it 'stands at the brink of impermissible coercion,' **United States v. Seawell**, 550 F.2d 1159, 1163 (9th Cir. 1977), and that 'even in the most acceptable form, [the **Allen** charge] approaches the ultimate permissible limits to which a court may go . . .' **Sullivan v. United States**, 414 F.2d 714, 716 (9th Cir. 1969)."

As a result, close scrutiny must be given to the actual charge and the circumstances in which it was given to determine if it had a coercive effect upon the jury. **United States v. Mason, supra; United States v. Beattie, supra;**

see also **Jenkins v. United States**, 380 U.S. 445, 446, 85 S.Ct. 1059, 1060 (1965).

In the instant case, after initially indicating that it rarely gave an **Allen** instruction, the court told counsel hat it was planning to give a modified **Allen** charge at the conclusion of the fifth day of deliberations if the jury indicated it was deadlocked.[4/] During the subsequent inquiry of the jury foreman, the court made the following statement:

> "Now, secondly, Ladies and Gentlemen, I, in speaking for all the parties here, deeply appreci-

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4/ All counsel objected to the giving of any type of **Allen** charge and moved for a mistrial. The court denied the motion, and again expressed its intention that if the jury indicated it was deadlocked, the court would give the modified **Allen** instruction.

ate the work and intentions and the conscientious care given by this jury to the resolution of this case. This case is a very important case for the government and for each individual defendant. It's extremely important, if the matter be resolved under the instruction of the court, that it be resolved. You all understand that. As I say, we're deeply appreciative of the work that you have done for the past several days.

Concerned that the emphasized language constituted the very essence of an **Allen** charge, counsel for appellant immediately brought the matter to the court's attention and requested that another **Allen** instruction not be given. The

court responded that it did not consider this language to be an **Allen** instruction in any way, and thereafter gave the following modified **Allen** charge:

> "Ladies and Gentlemen, I am going to ask that you resume your deliberations for a further period of time in an attempt to return a verdict. As I have told you, each of you must agree in order to return a verdict. You have the duty to consult with one another and to deliberate with a view of reaching an agreement if this can be done without violence to individual judgment.
>
> "Each juror must decide the case for himself or herself, but only after impartial consideration of the evidence with his or

her fellow jurors. During the course of your deliberations, each of you should not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. No juror, however, should surrender his or her honest conviction as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict."

To determine whether the use of this modified **Allen** charge was appropriate, an appellate court should look at four factors:

1. The form of the instruction;

2. The period of deliberation following the **Allen** charge;

3. The total time of jury deliberation; and

4. The indicia of coerciveness or pressure upon the jury.

See **United States v. Hooton**, 662 F.2d 628, 636 (9th Cir. 1981), discussing **United States v. Beattie, supra.**

While the first two factors were not in dispute, petitioner submits that a close examination of the latter two factors should have led to the conclusion that the **Allen** charge was in fact coercive, and should not have been given.

It must be remembered that even though the number of transcripts appear to make this case very lengthy, there were only 6-1/2 days in which evidence

was presented, the other 2 days being closing arguments. When the number of trial days, then, is taken into consideration with the fact that most of the evidence presented against the defendants involved direct sales of heroin to informants who were being monitored by surveilling agents, there can be no question that the wording of any **Allen** charge, no matter how moderate, had to have a substantial coercive effect when given during the fifth day of deliberations.

A similar argument can be made with regard to the last factor. At the time the modified **Allen** instruction was read, the court had already received two specific statements from the jury that they "seem[ed] to be at a standoff", and later that they were "hopelessly

deadlocked." The court responded to these statements first with the introductory remarks that this was a very important case for the Government and the individual defendants, and that if the jury could reach a decision under the instructions, that they should do so,[5/] and thereafter with the reading of the modified **Allen** charge. Again, no matter how moderate the language used, the reading of the instruction had to have a coercive effect upon the jury.

5/ This statement was not balanced at all by a reminder to the jurors of their duty and obligation not to surrender consciously held beliefs simply to secure a verdict for either party. See **U.S. v. Mason, supra**, 658 F.2d at 1268. Accordingly, the statement should have been considered an **Allen** charge by the court as counsel contended, and the giving of a second charge thus constituted automatic reversible error. See **U.S. v. Seawell**, 550 F.2d 1159, 1163 (9th Cir. 1977).

It is therefore submitted that considering all of these circumstances in which the modified **Allen** charge was given, that the case at bar was clearly not an appropriate one for such an instruction to be given after so many days of deliberations. It cannot be forgotten that the possibility of a hung jury is as much a part of our jury unanimity scheme as are verdicts of guilty and not guilty. The declaration of a mistrial because of the inability of a jury to reach a unanimous verdict serves to protect the interests of the defendant in many cases. As the Second Circuit noted in **United States v. Goldstein**, 479 F.2d 1061, 1068 (1973):

> "Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more

often than not defeats the ends of public justice; not only will such compulsion needlessly waste judicial resources, it may coerce erroneous verdicts."

CONCLUSION

For the above-mentioned reasons, petitioner GREGORY FOSTER, respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari.

Dated: February 6, 1984

Respectfully submitted,

LAW OFFICES OF
PANCER AND SHERMAN

MICHAEL PANCER

Attorney for Petitioner

APPENDIX A

For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GREGORY FOSTER
JOHNNIE LEE GIBSON
BILLY JACKSON
RONALD H. WILSON,

Defendants-Appellants.

Nos. 81-1765
81-1779
81-1778
82-1057

DC No. CR-81-0584-WBE

OPINION

FILED
JUL 26, 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

Appeal from the United States
District Court for the Southern
District of California
William B. Enright, District Judge,
Presiding

Argued and submitted November 4, 1982
Before: ROBB,* SCHROEDER and ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

Appellants Gregory Foster, Johnnie Gibson, Billy Jackson, and Ronald Wilson were each found guilty of conspiracy to possess heroin with intent to distribute, in violation of 21 U.S.C. §§ 841 (a)(1) and 846. In addition, appellant Foster was convicted of twenty counts of possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); appellants Jackson and Wilson were found guilty of one count of possession of heroin with intent to distribute; and appellant Gibson was found guilty of two counts of possession of

* Hon. Roqer Robb, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

heroin with intent to distribute, all in violation of 21 U.S.C. § 841(a)(1). We affirm the convictions on all counts.

Appellants have raised numerous issues on this appeal which we discuss below.

I.

SUFFICIENCY OF THE EVIDENCE

A. Conspiracy

Gibson, Wilson, and Jackson contend that the evidence was insufficient to establish that they participated in the conspiracy charged in the indictment.

When reviewing the sufficiency of the evidence to support a criminal conviction, the critical inquiry is whether, "after viewing the evidence in the light most favorable to the prosecution <u>any</u> rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319 (1979) (emphasis in original).

We must determine whether the trier of fact could reasonably arrive at its conclusion. All reasonable inferences must be drawn in favor of the government, and circumstantial evidence is sufficient to sustain a conviction. **United States v. Fleishman**, 684 F.2d 1329, 1340 (9th Cir.), cert. denied;, 103 S.Ct. 464 (1982).

In reviewing the sufficiency of the evidence, we must first determine whether the charged conspiracy was proved.

The government produced evidence at trial which showed that Foster was the head of a group of persons who were

engaged in the illegal distribution and sale of heroin in the San Diego area. The organization operated in the following manner. The heroin was sold in the streets by pushers. When a customer was obtained for a supply of heroin, the pusher would telephone an answering service number and leave a message for his supplier. The supplier in turn would be contacted through his beeper. The supplier would obtain the telephone number of the pusher and determine the amount of heroin necessary to fill the order, This amount would then be delivered to the pusher. Foster and others obtained and packaged the heroin for such distribution and sale. The heroin was cut with dextrose and placed in balloons which were placed in plastic bags. Each plastic bag contained eleven

balloons. The wholesale price to the pusher for eleven balloons was $195.00. The pusher could then sell the heroin at $25.00 for each balloon. The pusher thus realized a profit of $80.00 for each package of eleven balloons sold.

The foregoing evidence is clearly sufficient to prove the existence of the conspiracy charged in the indictment.

We next proceed to analyze the evidence offered by the government to connect Gibson, Wilson, and Jackson.

1. Gibson was linked to the Foster enterprise by a substantial amount of evidence. Minyon Logan testified that Gibson gave her a beeper and that on numerous occasions she received packages of heroin from him to sell. Logan's ledger contained many references to drug transactions involving Gibson. Her

ledger also contained many names of persons given to her by Gibson as potential "runners" (pushers). Further, she testified that she observed Foster and Gibson, together, cutting and filling balloons.

A beeper was found during the search of Gibson's residence. Invoices for the beeper showing Gibson's name were also discovered. Gibson was also linked to the Foster organization through the controlled heroin purchase made by Harvey Callier and Marco Banks, on September 25, 1979. This purchase involved the use of beepers. Gibson was connected to the purchase because the delivery of the heroin was made in a car registered to him.[1/]

2. Wilson

Dixie Boyles testified that she made several heroin purchases directly from Wilson, including one purchase on May 8, 1980 involving two bags of heroin.

Wilson's residence was searched on May 8, 1981. A traffic ticket was discovered during the search. It was received by Wilson while he was driving a car registered to Foster. Wilson's personal phonebook contained the names Gibson, Turner, and the initials "F.A." The evidence showed that Turner and Fred Arnold were members of the Foster enterprise.

The evidence also showed that Wilson had rented a beeper from the same firm used by other members of the Foster group. Wilson was shown to have received numerous calls on the beeper.[2/]

3. Jackson

On December 13, 1979, Harvey Callier purchased two balloons of heroin from Jackson. This transaction was recorded. Jackson's statements during the course of the transaction showed familiarity with the Foster organization. Jackson told Callier that Greg (Foster) had quit and that neither he nor his "lieutenants" had any drugs. Moreover, Jackson referred to the recent arrest of two members of the organization. He stated that the arrests had scared Foster and that he was going to lay low for awhile. Evidence was introduced that the initials "B.J." were found on pieces of paper at the homes of Foster, Fulford and Cordova. Fulford and Cordova were heavily involved in the Foster organization.

Logan stated that Gibson had given her the name of "B.J." as a potential runner. This was corroborated by the fact that "B.J." was written in her ledger. There was evidence in the record that Jackson was known by the initials B.J.

"Once the existence of a conspiracy is shown, 'evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy.'" **United States v. Fleishman**, 684 F.2d at 1340-41 (quoting **United States v. Dunn**, 564 F.2d 348, 357 (9th Cir. 1977) (emphasis in original)).

We are persuaded from a review of the entire record and the specific evidence

summarized above that there was ample evidence of more a than slight connection between Gibson, Wilson and Jackson to the conspiracy.

B. Substantive Counts

Wilson challenges his conviction on Count Thirteen for possession of two balloons of heroin on May 8, 1980 with intent to distribute. Wilson was charged in this count with a sale of heroin made to Boyles. Boyles' uncorroborated testimony was heavily impeached by prior inconsistent statements.

Boyles' testimony was not inherently implausible. Her testimony was sufficient to support the conviction. Because a witness' credibility is a matter for the jury to resolve, there

was sufficient evidence to support the conviction on the substantive count. **United States v. Rojas**, 554 F.2d 938, 943 (9th Cir. 1977).

Jackson challenges his conviction on Count Seven for possession of two balloons of heroin on December 13, 1979, with intent to distribute. Jackson contends that there is no proof that the drug purchased was in fact heroin. We disagree.

Agent Ashcraft testified that the two balloons sold by Jackson on that date were later determined to be heroin.

The above testimomy is arguably hearsay. Jackson, however, did not object to its admission.

Thus, the general rule applies that "where there is no objection to hearsay evidence, the jury may consider it for

whatever value it may have; such evidence is to be given its natural probative effect as if it were in law admissible." **United States v. Johnson**, 77 F.2d 1304, 1312 (5th Cir. 1978); **United States v. Bey**, 526 F.2d 851, 855 (5th Cir.), cert. denied, 426 U.S. 937 (1976).

It is also possible that Ashcraft was testifying as to his own opinion based on his prior education and training, field observations, and a chemical analysis of the contents of the balloons.

It is true that no foundation for such an opinion appears in the record. There was no objection on this ground. An objection would have afforded the government an opportunity to present whatever evidence was available to lay a

foundation for the admission of the contents of the balloons.

It is our view that sufficient evidence was introduced to support Jackson's conviction on the substantive count.

II.

SUFFICIENCY OF THE AFFIDAVIT

On May 8, 1981, government agents executed a series of search warrants at the residences of the defendants. The warrants were based on allegations contained in a single affidavit presented to the magistrate by Agent Williams.

Conceding that the affidavit contained sufficient information to justify their arrest, Foster and Gibson instead contend that the affidavit did not establish probable cause to search their

residences. Foster additionally argues that the trial court should have granted his motion for a hearing under **Franks v. Delaware**, 438 U.S. 154 (1978), because Agent Williams intentionally omitted from his affidavit allegedly exculpatory information.

The trial court rejected the probable cause challenges before trial. We review the court's determination that the affidavit was sufficient to provide probable cause to issue the warrant under the clearly erroneous standard. See **United States v. O'Connor**, 658 F.2d 688, 690-91 & n.5 (9th Cir. 1981).

The appellants are correct that probable cause to search a residence does not automatically follow from probable cause to believe a suspect guilty of a crime. **United States v. Valenzuela**, 596

F.2d 824, 828 (9th Cir.), cert. denied, 441 U.S. 965 (1979). To justify the search of a residence, the facts supporting the warrant must show probable cause to believe that the evidence sought is presently in the place to be searched. Id.

The affidavit in support of a warrant is to be given a common sense and realistic interpretation. **United States v. Chesher**, 678 F.2d 1353, 1359 (9th Cir. 1982), Such a reading may support an inference of probable cause "to believe that criminal objects are located in a particular place to which they have not been tied by direct evidence." **Valenzuela**, 596 F.2d at 828.

A. Foster

Read as a whole, the affidavit in this case suffices to justify the search of Foster's residence. The affidavit disclosed that Foster headed a major heroin distribution ring. On several occasions during the investigation, narcotics were seen at Foster's residence. One informant had overheard Foster admit that he maintained phony records to deceive the Internal Revenue Service (hereinafter IRS).

Moreover, Williams stated in the affidavit that based on his eleven years' experience as a narcotics agent, he believed that evidence of the defendants' drug dealings would be found at defendants' residences. Williams' opinion was an important factor to be considered in the magistrate's

determination whether probable cause existed. See **United States v. Johnson**, 660 F.2d 749, 753 (9th Cir. 1981), cert. denied, 455 U.S. 912 (1982); **Valenzuela**, 596 F.2d at 828-29; cf. **United States v. Dubrofsky**, 581 F.2d 208, 213 (9th Cir. 1978), cert. denied, 454 U.S. 950 (1981) ("[h]eroin importers commonly have heroin and related paraphernalia where they live"). In these circumstances, the trial court did not err in finding the affidavit sufficient to permit an inference that evidence would be found in Foster's residence.

Foster argues that the information contained in the affidavit was too "stale" to support a finding of probable cause. He points out that the most recent of the affidavit's references to

his residence concerns a February 1980 drug sale.

The passage of time is not necessarily a controlling factor in determining the existence of probable cause. The court should also evaluate the nature of the criminal activity and the kind of property for which authorization to search is sought. **United States v. Reid**, 634 F.2d 469, 473 (9th Cir. 1980), cert. denied, 454 U.S. 829 (1981). Tested under this standard, Foster's contention fails.

First, contrary to Foster's argument, the affidavit linked Foster to a heroin sale in February 1981, only three months before the warrant was executed. Cf. id. at 472-73 (probable cause to believe that documents would be found in May 1978 though events described in

affidavit had occurred in February and March 1977); **United States v. DiMuro**, 540 F.2d 503, 515-16 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (information in affidavit some four months old; finding of probable cause upheld).

Second, the affidavit sought evidence of a large-scale, ongoing criminal organization, not evidence relating to a completed criminal act. See **United States v. Huberts**, 637 F.2d 630, 638 (9th Cir. 1980), cert. denied, 451 U.S, 975 (1981). Foster admitted that he maintained bogus records to deceive the IRS, suggesting that he was in the business of selling the heroin linked to him but did not wish to disclose his income from illegal transactions. This statement supports an inference that the

criminal conduct was of a continuing nature. Id. Based on this information, the trial court could properly find probable cause to search the Foster residence for evidence of such activity.

Foster also contends that the trial court erred in denying his motion for **Franks'** hearing because Agent Williams intentionally omitted from his affidavit reference to three tape-recorded conversations suggesting that Foster had retired from the drug selling business. We have reviewed the affidavit carefully, and find that only one of the statements -- Foster's January 28, 1980 assertion to Logan that Foster had "quit" -- could arguably have affected the finding of probable cause to search Foster's residence.

In **Franks**, the Supreme Court held that when a defendant makes a substantial showing that an affidavit contains a false statement, knowingly or recklessly made and necessary to the finding of probable cause, a hearing must be held at the defendant's request. If the defendant's contention is established by a preponderance of evidence, and after deletion of the false material the affidavit is insufficient to establish probable cause, the search warrant must be set aside and the fruits of the search suppressed. 438 U.S. at 155-56; **United States v. Maher**, 645 F.2d 780, 782 (9th Cir. 1981) (per curiam) (**Franks** applies to allegedly material omissions; sub silentio); see also **United States v. Willis**, 647 F.2d 54, 58-59 (9th Cir. 1981).

Here, the failure to disclose Foster's exculpatory statement was not prejudicial. The affidavit links Foster to a heroin sale that occurred on February 26, 1981. Thus even had the magistrate known of Foster's statement, he could reasonably have determined that there was probable cause to search Foster's residence in May 1981.

B. Gibson

Gibson attacks the warrant as lacking in information to establish probable cause and as "stale". We disagree.

Five informants identified Gibson as a lieutenant in Foster's organization. William's affidavit details three sales by Gibson and two others in which a car registered to Gibson was used. Although the most recent sale in which Gibson

himself participated occurred in May 1980, business records showed that Gibson had rented a beeper like those used in organization and had made payments on it through March 1981.

When considered together with William's opinion that evidence of Gibson's drug dealings, including drug paraphernalia, would be found at Gibson's residence, this information is sufficient to uphold the trial court's determination of probable cause. See **United States v. Dubrofsky**, 581 F.2d at 213 (warrant may be upheld when the nexus between the items to be seized and the place to be searched rests upon the type of crime, nature of the items, and usual inferences where a criminal would likely hide contraband).

Gibson urges, however, that no factual allegations in the affidavit link him to the Oak Park residence. The affidavit concludes, in summary fashion, that the address is Gibson's. But the affidavit also states that the San Diego Gas & Electric Company suscriber at the address is Gibson's wife, Lera L. Gibson. The magistrate need not be convinced beyond a reasonable doubt that the facts in an affidavit are true. We find that the magistrate properly relied on the gas company records as justifying an inference that Gibson resided there because his wife did.

Finally, Gibson's challenge to the warrant on grounds of "staleness" is without merit. The affidavit disclosed that Gibson had made a payment on the rented beeper in March 1981, two months

before the search warrant was executed. Much of what we have said concerning Foster's "staleness" argument applies with equal force here. The continuing nature of the drug dealing organization fully justified a search of Gibson's residence for evidence of such dealing.

III.

ALLEGED PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY

Foster argues that prosecutorial misconduct before the grand jury constituted an impermissible infringement on the exercise of the grand jury's independent judgment. Foster cites six incidents of alleged misconduct, which, he urges, together required dismissal of the indictment.

The record does not demonstrate such misconduct. Foster did not designate as part of the record on appeal portions of the grand jury proceeding transcripts on which he relies. Foster has therefore failed in his burden of establishing error "not by assertion, but by the record." **L & E Co. v. U.S.A. ex rel. Kaiser Gypsum Co.**, 351 F.2d 880, 883 (9th Cir. 1965).

IV.

ADMISSIBILITY OF COCONSPIRATOR HEARSAY STATEMENTS

Foster and Gibson contend that the district court erred in admitting certain extrajudicial statements offered by the government under the coconspirator exception to the federal rules of evidence. See Fed. R. Evid. 801(d)(2)(E).

The appellants urge that the statements failed to meet the foundational requirements of Rule 801(d)(2)(E) and that admission of the statements violated their rights under the confrontation clause.

A. Foster

Over Foster's objection, Agent Ashcraft testified concerning statements made by defendant Jackson on two occasions. The first statement occurred during a heroin sale to Callier. Jackson told Callier that "Greg" (Foster) had quit selling drugs; that Foster's lieutenants had no drugs; and that Foster was scared over the arrest of other conspirators. In the second statement, Jackson told Gentry that "Greg" had stopped selling heroin

because someone had taken a large sack of money from him. Jackson also related that Foster planned to renew selling heroin as soon as he recovered the money.

It was error to admit these statements. Hearsay statements are admissible under the coconspirator exception only if made in "furtherance of the conspiracy." Fed. R. Evid. 801(1)(2)(E); **United States v. Perez**, 658 F.2d 654, 658 (9th Cir. 1981). Both statements by Jackson were mere narrative declarations insufficient to satisfy the strict requirements of the rule. See **United States v. Fielding**, 645 F.2d 719, 726 (9th Cir. 1981).

We do not agree with the government that the statement to Gentry must be construed as an attempt by Jackson to

nurture Gentry's continued interest in the organization by predicting that Foster would soon be selling heroin again. Unless the declarant is "'seeking to induce [the listener] to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirators' common objective,'" the declaration is inadmissible. Id., quoting **United States v. Moore**, 522 F.2d 1068, 1077 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976). Statements concerning activities of the conspiracy, including future plans, also are not admissible unless made with such intent. Id. No intent to elicit cooperation or assistance in achieving the common scheme is evident from the statements.[3/]

The improper admission of Jackson's statements under Rule 801(d)(2)(E) was not, in this case error of constitutional dimension. See **United States v. Castillo**, 615 F.2d 878, 883 (9th Cir. 1980). Therefore, reversal is required only if it is more probable than not that the error materially affected the verdict. **United States v. Rasheed**, 663 F.2d 843, 850 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982) **United States v. Valle-Valdez**, 554 F.2d 911, 916 (9th Cir. 1977). We are satisfied that the error was harmless. Almost every witness implicated Foster, and the evidence against him was overwhelming.

Foster also contends that his Sixth Amendment confrontation right was violated by admission of Jackson's statements.[4/] We disagree.

Confrontation claims are reviewed under a two-track approach that tests the necessity and reliability of the challenged testimony. **Ohio v. Roberts**, 448 U.S. 56, 65-66 (1980). Concerning the necessity requirement, the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it intends to offer against the defendant. Id. at 65. The Supreme Court has suggested, however, that complience with this requirement might not be mandatory when the testimony is neither "crucial" to the prosecution nor "devastating" to the defendant. **Dutton v. Evans**, 400 U.S. 74, 87, 89 (1970).

Although Foster contends that Jackson's hearsay statements were both "crucial" and "devastating", he concedes

that Jackson was unavailable within the meaning of the Sixth Amendment. Accordingly, even if Jackson's statement is viewed as "crucial" and "devastating," the rule of necessity inherent in the confrontation clause can not be said to have violated in Foster's case.

The reliability of a coconspirator's statements are tested under four indicia: (1) whether the declaration contained assertions of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether it was possible that the declarant was relying upon faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involve-

ment in the crime. **Dutton v. Evans**, 400 U.S. at 88-89; **United States v. Perez**, 658 F.2d at 661.

Foster challenges the admissibility of Jackson's hearsay statements only on the basis of factors (1) and (4). Although some of the statements made by Jackson referred to Foster's having previously quit the drug selling business, their introduction into evidence did not amount to a constitutional violation. All four **Dutton** elements need not be present for the proper admission of hearsay statements over a confrontation clause objection. Id. Moreover, there was little risk that the jury would give undue weight to such statements of past fact. See **Dutton**, 400 U.S. at 88. Evidence that Foster had quit

selling heroin could only have assisted his defense.

Foster urges that Jackson's statements to Callier included references to Foster only beceuse Callier "erroneously" believed that Foster was Jackson's supplier, and Jackson hoped to stall Callier until he could find a supply of heroin to sell Callier. However, because Jackson believed Callier to be a potential customer, not a government agent, Jackson would have had little apparent motive to falsify Foster's role in the crime. See **United States v. Snow**, 521 F.2d 730, 735 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976).

B. Gibson

Boyles testified that Sears told her that Sears' source of heroin was

"Johnnie Blue" (Gibson). Gibson challenges Boyle's testimony as incredible.[5/] Credibility determinations, however, are matters for the jury. See **United States v. Brady**, 579 F.2d 1121, 1127 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979).

Gibson also contends that Sears' statement was "crucial" to the prosecution and "devastating" to his defense. Because Gibson did not preserve this issue by a proper objection at trial, we review the issue under the plain error doctrine. See note 5, **supra**.

Gibson emphasizes that Sears' statement was highly incriminating. Even so, the prosecution's failure to produce the seemingly available witness did not render admission of the statement erroneous. The confrontation clause's rule

of necessity is not absolute, and production of the declarant/witness is not required when the "utility of trial confrontation [is] remote." **Ohio v. Roberts**, 448 U.S. at 65 n.7. In this case, Boyles also testified that she had herself purchased heroin from "Johnnie Blue." Any cross-examiation of Sears regarding his statement would, therefore, have served little purpose. We find no error in the trial court's admitting Boyle's testimony,

V.

ADMISSIBILITY OF THE LEDGER

Over Gibson's objection, Logan's ledger was admitted into evidence under the business record exception of Fed. R. Evid. 803(6). The ledger, which contained records of drug transactions,

implicated Gibson in the conspiracy. Gibson contends that the ledger was improperly admitted because the records were not kept in the course of regularly conducted business activity and because the entries were untrustworthy.[6/]

To be admissible as a business record under Rule 803(6), the record must have been kept in the "regular course" of a business activity. **Clark v. City of Los Angeles**, 650 F.2d 1033, 1036 (9th Cir. 1981), cert. denied, 456 U.S. 927 (1982). A record is considered as having been kept in the regular course of business when it is made pursuant to established procedures for the routine and timely making and preserving of business records, and is relied upon by the business in the performance of its functions. Id. at 1037.

Logan testified that she kept a record of most of her large drug transactions. She stated that it was her regular practice to enter into the ledger the number of balloons that went out on a particular day and how much money she took in. The transactions were recorded contemporaneously, and Logan relied on them. This evidence was sufficient to satisfy Rule 803(6).

The fact that the ledger was an incomplete record of Gibson's drug dealings and contained several blank pages and unrelated entries did not render the ledger inadmissible. The accuracy of the remaining pages was not altered simply because Logan did not record every heroin sale that occurred. See **United States v. Baxter**, 492 F.2d 150,

165 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974).

Nor does the fact that the entries were made out of sequence destroy their accuracy. The entries were made at or near the time of the events described and they satisfied the regularity requirement. Their sequence was therefore irrelevant. **United States v. McPartlin**, 595 F.2d 1321, 1348 (7th Cir.), cert. denied, 444 U.S. 833 (1979).

Gibson argues that the entries were nonetheless untrustworthy. However, because Logan had to rely on the entries, there would have been little reason for her to distort or falsify them. See id. at 1347.

VI.

ALLEGED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

During closing argument, the prosecutor reminded the jury that Agent Ashcraft had testified that one of the defendants had given the government information to support a warrant for the search of Logan's residence. He argued that none of the defense counsel had inquired of Ashcraft whether it was his client who had provided the information. The prosecutor then suggested that the defendants were "hanging together" to conceal their guilt, as they had throughout the conspiracy, and that defense counsel were acting in support of that goal. Foster's counsel objected to this line of argument.

The prosecutor may well have exceeded the wide latitude permitted counsel in closing argument. See **United States v. Parker**, 549 F.2d 1217, 1222 (9th Cir.), cert. denied, 430 U.S. 971 (1977). The next morning, however, defense counsel agreed to the prosecutor's offer to correct any misconception. The prosecutor then told the jury that he was referring to the defendants only and did not mean to imply that defense counsel were part of a conspiracy.

Improprieties in counsel's arguments to the jury do not constitute reversible error "unless they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge." Id. In this case, the trial court left it to defense counsel to decide whether the prosecutor

should correct his statement. If any prejudice to Foster resulted from the prosecutor's argument, it was neutralized by counsel's corrective statement.

VII.

ALLEN CHARGE

The jury acquitted defendant Henderson on the fourth day of deliberations. On the afternoon of the fifth day, the trial judge received a note requesting that one of the jurors be released because of the strain on the individual's family and job. After discussing the matter with counsel, the judge responded with a note asking the jury to continue its deliberations.

Later that afternoon the court received a second note: "Another juror wants to be released. We seem to be at

a standoff, and she feels that there is no clear end in sight." The judge informed counsel that he was considering giving the jury a modified version of the **Allen** charge, prompting defense counsel to move for a mistrial.

The jury was then summoned, and the foreperson indicated that no other verdict had been reached. The judge reminded the jurors of the importance of the case and thanked them for their work. At the judge's suggestion the jury retired to consider whether it would like a day off to address the concerns expressed in the notes. When the jury returned the foreperson stated that the majority of the jurors wished to return the next day, but that a few members thought that "discussions [were]

hopelessly deadlocked and no further progress [could] be made."

The court then gave the modified **Allen** charge[7/] and excused the jury for the day.[8/] Three days later an eleven-person jury returned with verdicts as to Foster, Jackson, and Gibson. See discussion infra.

In reviewing the propriety of an **Allen** charge, the court must examine the instruction in its context and under all the circumstances to determine whether it had a coercive effect. **United States v. Hooten**, 662 F.2d 628, 636 (9th Cir. 1981), cert. denied, 455 U.S. 1004 (1982). This circuit evaluates coerciveness on the basis of (1) the form of the instruction; (2) the period of deliberation following the **Allen** charge; (3) the total time of jury

deliberations; and (4) the indicia of coerciveness or pressure upon the jury. **United States v. Beattie**, 613 F.2d 762, 765-66 (9th Cir.), cert. denied, 446 U.S. 982 (1980).

Relying on factors (3) and (4), Foster, Jackson, and Gibson contend that the **Allen** charge had a coercive effect on the jury. They emphasize that nearly all of the government's case rested on the testimony of informants, and that the charge came after two jurors had indicated their desire to be relieved of duty.

The total time of juror deliberation is relevant as to the coercive effect that an **Allen** charge may have had in relation to the difficulty of the task before the jury. See **United States v. Moore**, 653 F.2d 384, 390 (9th Cir.

1981). Trial in this case lasted eight and one-half days; verdicts as to Foster, Jackson, and Gibson were rendered on the eighth day of deliberations. During those eight days, the jury considered numerous counts against eight defendants charged in a sophisticated drug-selling operation. In these circumstances, we cannot conclude that the **Allen** charge "coercively produced the result." **United States v. Beattie**, 613 F.2d at 766.

The appellants' emphasis on the nature of the government's proof is unavailing. The length of the deliberations can also be viewed as reflecting a proper circumspection by jurors who had to consider the credibility of several, paid government informants with criminal records.

Finally, we find nothing in the record indicating an indicia of coerciveness or pressure upon the jury. First, the jury in this case rendered discriminating verdicts, acquitting three codefendants after the judge read the **Allen** charge. This fact significantly weakens the appellant's argument that the jury was coerced by the **Allen** charge. Second, although the jury had twice indicated that they were deadlocked, the record does not reveal that either the jury or the judge had expressed "a sense of frustration at the jury's failure to reach a verdict." **Moore**, 653 F.2d at 390; cf. id. (**Allen** charge properly given after trial judge had received two notes indicating that jurors were deadlocked). Moreover, because the trial judge in this case was

unaware of how the jury stood, there was no danger that the **Allen** charge would "suggest to the minority position jurors that [the judge] was speaking directly to them," **Beattie**, 613 F.2d at 766.

We conclude that the trial judge did not abuse his discretion in giving the **Allen** charge. Id.

VIII.

RULE 24(c) WAIVER

During the settling of instructions, the trial court suggested that the parties stipulate to a waiver of Fed. R. Crim. P. 24(c). The judge expressed his concern that the trial had been lengthy and outlined his proposal for the substitution of any juror determined to be unable to continue: "Retain the alternates, maintain the confidentiality, use

[an alternate] if good cause appears [and] insert [the alternate] in the jury room if the need arises."

On the last day of trial, defense counsel agreed to the stipulation prepared by the judge, with the modification that only the first two alternates be retained. All defendants and their counsel signed the stipulation without further discussion or objection.

During the sixth day of jury deliberations, the court received a third note from the jury (see part VII, **supra**). The foreperson informed the judge that a juror was encountering marital and business problems and wished to be released. The note indicated, however, that the rest of the jury was still deliberating and that the court should not infer that

the reluctant juror was holding out one way or the other.

In the presence of all counsel, juror Perez was examined in chambers. Thereafter the court stated its intention to dismiss the juror for good cause. After denying counsels' motion for a mistrial, the court asked counsel for suggestions, referring to the Rule 24(c) waiver.

Counsel for Foster initially indicated that he wished to continue with an eleven-member jury. But when counsel for defendant Norman indicated that upon rereading Rule 24(c) he did not think the rule could be waived, counsel for Foster stated that when he agreed to waive Rule 24(c), he could not have envisioned the unusual turn of events that had occurred.

The court responded that unless the parties unanimously agreed to the proposal for an eleven-person jury, he would hold them to the stipulation. Wilson stated that he preferred to proceed with the alternate, but each of the remaining defendants personally waived his right to a twelve-person jury. See Fed. R. Crim. P. 23(b). The court then excused juror Perez.

The next day the parties agreed that because only Wilson wished to proceed with the alternate juror, the jury should be instructed, before the alternate was seated, that it should not consider Wilson's case until it had finished deliberations on the remaining defendants. The alternate would then be seated and the jurors would begin deliberation anew on the counts against

Wilson. Wilson agreed to this proposal in open court, and the jurors were instructed accordingly.

The jury returned verdicts on Foster, Jackson and Gibson on the afternoon of the eighth day of deliberations. The alternate was installed the next day, and the court instructed the jury to begin deliberations anew. Wilson was found guilty on the tenth day of deliberations.

Fed. R. Crim. P. 24(c) provides in part that alternate jurors "shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to

consider its verdict." This court has held that the provisions of the rule may be waived by stipulation. **Leser v. United States**, 358 F.2d 313, 317-318 (9th Cir.), cert. dismissed, 385 U.S. 802 (1966).

In this case, the appellants unconditionally waived the discharging of the first two alternate jurors and stipulated that, for good cause, an alternate could be substituted after deliberations had begun. Each appellant and his counsel signed the written stipulation without objection. The appellants do not contend that their waivers were unintelligent. Thus we are loath to find that the Rule 24(c) waivers were ineffective.

The appellants urge that the trial judge coerced them into making the stipulation. See **Leser**, 358 F.2d at 317.

The record, however, belies any such interpretation of the circumstances. Admittedly, the judge suggested the idea of the waiver and prepared the stipulation. Appellants and their counsel, however, fully acquiesced in the waiver, insisting on the retention of only the first two alternates.

The appellants also contend that the dramatic turn of events -- the rendering of a partial verdict, the notes from jurors seeking release, indications that the jury was deadlocked, and the giving of an **Allen** charge on the fifth day of deliberations[9/] -- required that the court relieve them from the stipulation. In support of their argument, they cite this court's decision in **United States v. Lamb**, 529 F.2d 1153 (9th Cir. 1975) (en banc).

In **Lamb**, the court held that the trial court's failure to follow the mandatory requirements of Rule 24(c) mandated a reversal of the appellant's conviction in the circumstances. Id. at 1156-1157. Although **Lamb** did not involve an express waiver, the court stated in dicta that even had there been such waiver it would not have remained effective due to the "dramatic change in circumstances" that had occurred after the jury first begain to deliberate. Id. at 1157.[10/]

We are not persuaded that the dicta in **Lamb** should be applied in this case. As we have indicated, the original Rule 24(c) waiver was valid as to each appellant. Upon dismissal of the regular juror, the court accommodated defense counsels' request that six of

the defendants be permitted to proceed with eleven jurors. The court carefully instructed the jury as to their obligations concerning these deliberations. Similarly, the court followed the literal wording of the Rule 24(c) stipulation when it instructed the newly-constituted jury to begin deliberations anew as to Wilson. In these circumstances, we decline to presume that the jury failed to follow the court's instructions.[11/]

Finally, the appellants have not established that they suffered any prejudice from the trial court's resolution of the substitute juror problem. Indeed, on his record such a showing presents a difficult task. Those appellants who chose to proceed with eleven jurors validly waived the provisions of

both Rules 24(c) and 23(b). By his choice to have the alternate participate in the deliberation of his case, Wilson agreed to a permissible Rule 24(c) waiver twice. We conclude that the trial court did not err in refusing to grant the appellant's motion for a mistrial.[12/]

IX

NEW TRIAL MOTION

Six days after the jury returned its verdict against him, Wilson filed a motion for a new trial pursuant to Fed. R. Crim. P. 33. The trial court denied the motion on the ground that Wilson had failed to satisfy the requirements for granting a new trial set forth in **United States v. Brashier**, 548 F.2d 1315, 1327 (9th Cir. 1976).

Wilson argues that the court should not have applied the **Brashier** standard in evaluating his motion, but rather should have assessed his request under a rule that favors granting new trial motions based on newly discovered evidence if the request is made within seven days of the verdict and if it is in the interest of justice to do so. See 3 C. Wright, Federal Practice and Procedure § 557 (1982). We need not express any opinion on such a standard because Wilson did not argue this theory in the trial court. Wilson instead attempted to fit his motion within the **Brashier** guidelines. He does not challenge the trial court's denial of the motion under **Brashier**, and we decline to review his argument raised for the first time on appeal. See **Collins v.**

Thompson, 679 F.2d 168, 171 (9th Cir. 1982).

All appellants' convictions on all counts are AFFIRMED.

FOOTNOTES

1/ No identification was made of the person or persons within Gibson's car.

2/ 154 calls were the maximum number of calls allowed without incurring additional charges. In October 1979 Wilson received 359 calls. In December 1979 he received 261 calls.

3/ Such intent is evident, however, in a series of conversations between Callier and Hamilton, Davis and Turner, in which they referred to Foster as the head of the organization and as a supplier of heroin. Callier had approached these individuals claiming that he was having difficulty getting a steady supply of heroin and was willing to sell in the downtown area where Foster allegedly needed a distributor. The references to Foster were aimed at meeting Callier's purported need and were therefore made to induce Callier to join the conspiracy.

4/ It is unclear from the record whether Foster preserved this issue by a proper objection at trial. Following the Government's opening statement, at which the prosecutor read the entire Jackson/Callier conversation to the jury, Foster moved for a mistrial, raising the confrontation issue. During the government's case-in-chief, Foster again vaguely alluded to the confrontation problem that Agent Ashcraft's testimony would present. Foster also raised

several, more specific objections; all were overruled. The record does not establish, however, whether the trial judge intended to overrule a confrontation objection.

Even if the record does not establish a proper objection at trial, we review the issue under the plain error doctrine. See **United States v. Traylor**, 656 F.2d 1326, 1333 (9th Cir. 1981).

5/ Gibson's contention based on the admissibility of statements under Fed. R. Evid. 801(d)(2)(E) relates only to the Jackson/Callier conversation described above. Gibson was never mentioned by Jackson in these statements. Thus there is no basis for Gibson's challenge that the trial court violated Rule 801(d)(2)(E).

6/ This court has held that the running accounts of illicit enterprises are "business records," subject to the ordinary requirements regarding the admissibility of writings. See **United States v. Baxter**, 492 F.2d 150, 165 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974); **Arena v. United States**, 226 F.2d 227, 234-35 (9th Cir. 1955), cert. denied, 350 U.S. 954 (1956).

7/ The judge instructed the jury as follows:

> Ladies and Gentlemen, I am going to ask that you resume your deliberations for a further period of time in an attempt to return a verdict. As I have told

you, each of you must agree in order to return a verdict. You have the duty to consult with one another and to deliberate with a view of reaching an agreement if this can be done without violence to individual judgment.

Each juror must decide the case for himself or herself, but only after impartial consideration of the evidence with his or her fellow jurors. During the course of your deliberations, each of you should not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. No juror, however, should surrender his or her honest conviction as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

8/ We agree with the trial judge that his earlier remarks about the importance of the case did not constitute an **Allen** charge. The judge told the jury that the case was very important for the government and for each defendant. He added that it was extremely important that "if the matter [can] be resolved under the instructions of the court, that it be resolved." These remarks did not approach an instruction "admonishing [the] jurors to reconsider their position," **United States v. Beattie**, 613 F.2d 762, 765 (9th Cir.), cert. denied,

446 U.S. 982 (1980). We therefore reject the appellants' contention that the trial court gave two Allen instructions, triggering this circuit's rule of per se reversal in such circumstances. See **United States v. Seawell**, 550 F.2d 1159, 1163 (9th Cir. 1977), cert. denied, 439 U.S. 991 (1978).

9/ As indicated above the trial judge was within his discretion in giving the **Allen** charge.

10/ In **Lamb**, the trial judge discharged an alternate juror but instructed her to stand by in case she were needed. During the course of the jury's deliberations, the judge received a note from a juror asking to be excused. The judge then called the alternate and asked her to return. Subsequently, the judge was informed that a verdict had been reached. He called the alternate again and told her not to return.

The judge refused to accept the verdict, however, because it was inconsistent with the instructions. He then questioned and excused the juror who had written the note. Over defense counsel's objection, the alternate was recalled and joined the jury, which was instructed to begin deliberations anew. The jury returned with a quilty verdict twenty-nine minutes later. 529 F.2d at 1154-55.

11/ As it had done with the regular jurors, the court admonished the two retained alternates to maintain the confidentiality of the proceedings.

12/ It should be noted that the Supreme Court has approved changes in the criminal rules which would permit the district court to excuse a juror and obtain a verdict from 11 jurors without a stipulation. 51 U.S.L.W. 4501, 450 (U.S. May 3, 1983).